

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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*Page I*  
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**FILE: B-205871**

**DATE: June 14, 1982**

**MATTER OF: SKS Group, Ltd.**

**DIGEST:**

1. Bidder which allegedly structured its bid contrary to the invitation's stated evaluation and award factors based on oral advice from the contracting officials and the contracting agency's "historical" method of evaluation does not have meritorious ground of protest since the solicitation warned bidders not to rely on oral advice and mistakes in the evaluation of bids under prior solicitation do not control the proper method of evaluation for the current procurement.
2. Solicitation for reporting services called for eight separate line item prices; however, solicitation's award formula expressly included only three item prices. Failure of award formula to include five other item prices does not justify cancellation of solicitation since: (1) two of omitted item prices were otherwise fixed by the solicitation; (2) one item (duplicated copy), for which quantity estimate was given, was apparently priced by all bidders--including one bidder who included price in another item--and prices for item apparently do not affect standing of bidders; and (3) procuring agency has not contested protester's position that remaining two items were not needed.

SKS Group, Ltd. (SKS), protests the cancellation of invitation for bids (IFB) No. FLRA-81-B-0001, issued by the Federal Labor Relations Authority (FLRA).

The IFB solicited verbatim reporting services for FLRA offices in the 48 contiguous States (schedule 1) and in Alaska, Hawaii, Puerto Rico and the Virgin Islands (schedule 2). Services were requested for a 1-year contract with an option to extend for an additional year. Six bids were submitted. After bid opening, FLRA canceled the IFB on the grounds that the specifications were defective and that FLRA's evaluation of bids had not been in "accordance with the IFB's evaluation and award factors." SKS argues that FLRA has not demonstrated that it had a compelling reason to cancel the solicitation and that FLRA therefore should reinstate the IFB and award a contract for schedule 1 to SKS, the low bidder. Neal R. Gross and Company (NRG) was the apparent low bidder for schedule 2.

We sustain the protest.

The format of schedule 1 was as follows:

		<u>"PRICE PER PAGE"</u>	
		<u>IN-Regional</u>	<u>OUTSIDE</u>
		<u>Office City</u>	<u>Regional</u>
		<u>and Wash.,</u>	<u>Office</u>
		<u>D.C.</u>	<u>City</u>
"A.	Hearings in the 48 contiguous states and Washington, D.C., including oral argument before the Authority.		
1.	Ordinary copy.....	\$ _____	\$ _____
2.	Expedited copy (1.5 x per page rate for ordinary copy).....	\$ _____	\$ _____
3.	Prompt copy (2 x per page rate for ordinary copy).....	\$ _____	\$ _____
4.	Daily copy.....	\$ _____	\$ _____
"B.	Cancellations.....	\$ _____	\$ _____
"C.	Attendance fee.....	\$ _____	\$ _____
		<u>PRICE PER PAGE</u>	
"D.	Duplicated copy.....	\$ _____	
"E.	Single late-ordered duplicated copy or portion thereof.....	\$ _____	

The schedule also provided:

"\*Evaluation factors for Schedule 1, First and Second Year, are as stated on Pages 43 and 44.

"NOTE: QUANTITIES ESTIMATED FOR ONE YEAR WILL BE USED AS A MULTIPLIER FOR YEAR TWO FOR EVALUATION PURPOSES."

As amended, the IFB's "Evaluation and Award Factors" for schedule 1 set out estimated quantities for all the above items listed in the schedule format except A.4, "Daily copy," and "E," "Single late-ordered duplicated copy." The evaluation factors further specified that the "[t]otal basis for evaluation of bids" would be based on the total of schedule items A.1, "B," and "C." As to items A.4 and "D," the IFB further stated that these "copy rates \* \* \* would not be evaluated except to the extent that such rates shall not be exorbitant" and that "bidders offering prices for [item "D"] which appear exorbitant may be required to submit evidence to support prices offered."

FLRA apparently evaluated the six bids it received by multiplying the unit prices offered for items A.1, "B," and "C" by the estimated quantities set out in the amended "Evaluation and Award Factors" and then adding all these extended prices together. The result found SKS the low bidder on schedule 1. FLRA, however, decided to cancel the IFB. The reasons for this decision were:

- (1) The evaluation and award factors were confusing and had led to "inappropriate and unnecessary discussion with prospective bidders";
- (2) "Award factors furnished interested bidders under the previous contract in accordance with the Freedom of Information Act would have disclosed deficient and misleading information";
- (3) The amended "Evaluation and Award Factors" had failed to correct an "ambiguous invitation";

- (4) "Due to the deficient and misleading information provided to the prospective bidders, a bidder who appeared to be the low bidder in response to the IFB may not in fact have been the lowest bidder"; and
- (5) "The bids received did not provide competition which was adequate to insure reasonable prices."

SKS argues that there is nothing confusing about the evaluation factors and that FLRA, through its interpretation of the IFB, is creating confusion where none existed before. SKS believes that it is sufficiently clear from the IFB how bids were to be evaluated and notes that the bids were in fact evaluated in accordance with what SKS argues is the stated method--unit prices for items A, 1, "B," and "C" multiplied by the estimated quantities, then added together to determine the low overall bidder. SKS also sees no validity to FLRA's argument that information obtained under the Freedom of Information Act about prior procurements somehow misled other bidders. Likewise, SKS finds no merit in FLRA's claim that somehow the low bidder--meaning SKS--"may not in fact have been the lowest bidder" or that there was not adequate competition to insure reasonable prices. SKS argues that these statements are totally unsupported by any facts and, therefore, should be disregarded as a basis for cancellation.

We have recognized that contracting officers have broad discretionary authority to reject all bids and cancel an IFB. However, because of the potential adverse impact on the competitive bidding system of canceling an IFB after all bid prices have been exposed, contracting officers, in exercising their discretion, must find that a compelling reason exists which warrants cancellation. The fact that the terms of an IFB are deficient in some way does not by itself constitute such a compelling reason. In determining if a compelling reason exists to justify cancellation, two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated

in an unfair and unequal manner if an award were made. See Johnson & Wales College, B-199293, April 8, 1981, 81-1 CPD 266, and cases cited.

One reason FLRA advances in justifying the cancellation is that because of prebid discussions and information made available under the Freedom of Information Act about prior bid evaluations, some bidders were allegedly misled. FLRA does not explain what it means by this, but it appears that it is in reference to NRG.

NRG has informed us that, in a 1979 solicitation for the same services and containing the same evaluation factors, FLRA evaluated the bids by merely adding up the unit prices and awarding the contract to the company with the lowest aggregate unit bid. According to NRG, no one ever protested this action and it resulted in an award to a company that would not have been the low bidder if the unit prices had first been multiplied by the estimated quantities and then totaled. NRG says that, prior to submitting its bid under the present solicitation, it asked the FLRA procurement officials if bids would be evaluated as the IFB indicated or as FLRA had done in 1979. According to NRG, it was told that bids would be evaluated as in 1979 and not as the IFB indicated. As a result, NRG allegedly priced its bid by "disregarding the quantity estimates completely" so that it would be low if all the unit prices were added together. NRG believes that this shows that it and some of the other bidders were misled by what FLRA has done "historically" in the face of what was actually provided for by the IFB's evaluation factors. Thus, in NRG's opinion, all the bidders were not able to compete on a fair and equal basis and this prebid information was, therefore, a basis for cancellation of the solicitation.

We do not agree. The fact that FLRA may have evaluated the bids on a unit price basis under the 1979 solicitation has no bearing on the proper evaluation method for the present solicitation; as indicated below, the only proper method of evaluating bids here was to determine the low bidder based on extended, not unit, prices. And it is well established that prior erroneous

contract actions do not estop an agency from applying correct procedures on a subsequent procurement. See Medi-Car of Alachua County, B-205634, May 7, 1982, 82-1 CPD \_\_\_\_\_. Likewise, the oral information which allegedly NRG received from FLRA has no bearing on the outcome of this case. Paragraph 3 of standard form 33-A, which was part of the IFB, provides in pertinent part:

"Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing \* \* \*. Oral explanations or instructions given before the award of the contract will not be binding."

Therefore, NRG acted at its own peril when it relied on the oral advice it received from the FLRA procurement official. See Delora Haidle, B-194154, April 5, 1979, 79-1 CPD 243.

As indicated above, cancellation is not called for merely because the terms of the IFB are in some way deficient. FLRA's main argument appears to be that the IFB was not clear that the unit prices were to be multiplied by the estimated quantities (listed outside of schedule 1) to determine the aggregate bid. However, as indicated above, schedule 1 specifically directed the bidders to the pages of the IFB where the estimated quantities were listed. Moreover, the schedule noted: "Quantities estimated for one year will be used as a multiplier for year two for evaluation purposes." This information was a clear notice to bidders that the estimated quantities would be used as a multiplier in the evaluation of the bids.

We were faced with a somewhat analogous situation in Tennessee Valley Service Company, B-188771, July 20, 1977, 77-2 CPD 40. In that case, the contracting agency had canceled the IFB on the grounds that it was unclear from the schedule and the evaluation factors whether the aggregate bid for evaluation purposes was to be determined by simply adding the unit prices together or by multiplying the unit prices times the estimated quantities which, as in the present case, were not listed on the schedule, but found elsewhere in the IFB. We held that the agency had erroneously canceled the IFB. We based this conclusion on the general rule that the award of any Government contract

must be on the basis of the most favorable cost to the Government, assuming the responsiveness of the bid and the responsibility of the bidder, as well as the fact that the lowest bid must be measured by the total work to be awarded. In light of this, we stated that, notwithstanding the IFB's evaluation clause, "the only proper way to evaluate the bids submitted here was to multiply unit prices by estimated quantities."

In our view, the key question to be resolved here is whether the solicitation provided for the determination of the low bid based on the work actually to be required. The protester argues that the omission of item prices in the award formula for "Expedited copy" (A.2), "Prompt copy" (A.3), "Daily copy" (A.4), "Duplicated copy" (D), and "Single late-ordered duplicated copy" (E) is not significant. As argued by the protester:

"[B]ecause of the low price bid by SKS for duplicate copy inclusion of that item in the evaluation of each bid price would not alter SKS's standing as the low responsive bidder.

\* \* \* \* \*

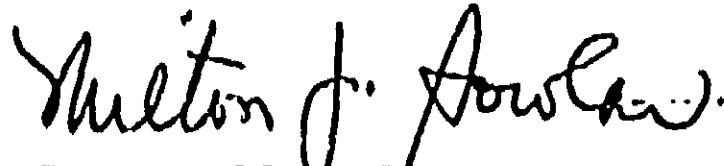
"Since the prices bid for expedited and prompt copy are fixed at specific multiples of the price bid for ordinary copy, omission or inclusion of these prices in the overall evaluated price would not affect the relative standing of the bidders. Similarly, omission of the price bid for daily copy [and 'Single late-ordered copy'] does not affect the relative standing of the bidders because the FL/A has indicated by omitting any estimate[s] \* \* \* that it does not intend to order [these items]."

We can accept the protester's argument as to A.2 and A.3 since these prices are fixed by the IFB. Moreover, since the IFB estimated the number of duplicated copies needed, and all bidders apparently priced "Duplicated copy" (including one bidder, Bay State Reporting Company, which apparently included the duplicated copy price in its "ordinary" copy price), we agree that

this IFB defect was insignificant to the extent the relative standing of bidders is not affected. And since the IFB (which stated only that a fixed-price contract was contemplated) did not clearly require that a mandatory award be made in the aggregate for both schedules, FLRA was free to consider multiple awards for these schedules contrary to the suggestion of Bay State. See Granite State Machine Co., Inc., B-199644, November 26, 1980, 80-2 CPD 396.

As to items A.4 and "E," for which no estimates were provided in the IFB, FLRA has not objected to the protester's argument that these items were not needed. Consequently, unless FLRA can show that it needed these items, the absence of these items from award formula is not legally significant and FLRA should consider the feasibility of award(s) under the canceled IFB.

By separate letter of today, we are informing the Executive Director, FLRA, of our findings.



Acting Comptroller General  
of the United States